MBf Holdings Bhd v East Asiatic Co (Malaysia) Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S1-22-156 OF 1995
KC VOHRAH J
23 AUGUST 1995

Civil Procedure *— Injunction — Interlocutory injunction to restrain dealing in shares — Principles applicable — Value of shares far exceeded damages claimable — Whether injunction should be granted*

Civil Procedure *— Injunction — Interlocutory mandatory injunction to compel delivery of vacant possession — Whether special circumstances existed — Whether damages adequate remedy*

The plaintiff ('MBf') entered into a sale and purchase agreement ('the agreement') with the defendant ('EAC') to purchase 5082.4 acres of estate land ('the land') for the price of RM115,878,492. This consideration was paid through the issue of 72,424,058 MBf shares ('the shares') and the land was transferred to a nominee of MBf, Glocard Sdn Bhd ('Glocard'). However, 50 acres of the land was occupied by 200 former workers of EAC who refused to vacate. MBf contended that EAC had failed to deliver vacant possession of the land on the completion date. MBf, in its summons-in-chambers, has filed for injunctive reliefs, one to restrain EAC from dealing with the shares that had been issued to EAC and the other to compel EAC to do all acts necessary to deliver vacant possession of the land. MBf had also sued for damages for breach of the agreement. On the other hand, EAC in its defence, alleged that vacant possession in the context of various clauses in the agreement was deemed to have been delivered on the completion date. EAC further argued that the workers were no longer their employees, but were trespassers on the land of the registered owner, Glocard, who would be responsible for evicting them.

Held, dismissing the plaintiff's application:

(1) An injunction which forbids the doing of an act is prohibitory, while an injunction which directs the defendant to do something to repair an omission is mandatory. In this case, the injunction sought by MBf to restrain EAC from dealing with the shares was a prohibitory injunction, while the one sought against EAC to do all acts to deliver vacant possession of the land was a mandatory injunction.

(2) To determine whether the prohibitory interlocutory injunction to restrain EAC from dealing with the shares would be granted, the principles in *American Cyanamid Co v Ethicon* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 were applicable. MBf would be required to show that there was a serious question

to be tried, that damages would not be adequate compensation if it were to succeed at the trial, that the balance of convenience lay in its favour, and that there were special circumstances in its favour. In this case, the relief sought to freeze dealings in MBf's shares worth more than RM115m was inordinately disproportionate to the amount of damages that could be claimed for any delay in evicting the workers, and it would be highly unconscionable for the court to grant it.

(3) The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. An interlocutory mandatory injunction would not be granted unless the case is clear and should be decided at once. A high degree of assurance that at the trial it will appear that the injunction was rightly granted is required.

(4) In the instant case, a mandatory injunction to compel EAC to take all necessary steps to deliver vacant possession was clearly not suitable. No special circumstances existed and there was a serious dispute as to whether EAC had delivered vacant possession in accordance with the terms of the agreement. Also, it was impossible to fix a time within which EAC must recover the premises. Damages would be an adequate remedy in the circumstances of this case and clearly, EAC would be able to afford to pay damages if the trial result was not in its favour.

[Bahasa Malaysia summary

Plaintif ('MBf') telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') dengan defendan ('EAC') untuk membeli 5082.4 ekar tanah estet ('tanah tersebut') untuk harga sebanyak RM115,878,492. Balasan ini telah dibayar melalui pengeluaran syer 72,424,058 MBf ('syer tersebut') dan tanah itu telah dipindahmilik kepada penerima namaan MBf, Glocard Sdn Bhd ('Glocard'). Walau bagaimanapun, 50 ekar daripada tanah itu telah diduduki oleh 200 orang bekas pekerja EAC yang enggan berpindah. MBf mengatakan bahawa EAC telah gagal menghantarserahkan milikan kosong tanah tersebut pada tarikh penyelesaian seperti yang telah dipersetujui. MBf, di dalam saman dalam kamarnya, telah memohon relief injunktif, satu daripadanya untuk menyekat EAC daripada berurusan berkenaan dengan syer yang telah dikeluarkan kepada EAC, dan yang satu lagi untuk memaksa EAC untuk membuat kesemua tindakan yang diperlukan untuk menghantarserahkan milikan kosong tanah tersebut. MBf juga telah menuntut ganti rugi untuk kemungkiran perjanjian tersebut. Sebaliknya, EAC mengatakan di dalam pembelaannya bahawa milikan kosong mengikut konteks pelbagai fasal di dalam perjanjian tersebut adalah dianggap sebagai telahpun dihantarserah pada tarikh penyelesaian. EAC juga berhujah bahawa pekerja tersebut bukan lagi merupakan pekerja mereka, tetapi merupakan penceroboh di atas tanah pemunya berdaftar, Glocard, yang akan bertanggungjawab untuk mengusir mereka.

Diputuskan, menolak permohonan plaintif itu:

(1) Suatu injunksi yang menghalang pembuatan suatu tindakan adalah bersifat larangan, manakala suatu injunksi yang mengarahkan supaya defendan membuat sesuatu untuk meremedikan suatu peninggalan adalah bersifat mandatori. Dalam kes ini, injunksi yang dipohon oleh MBf untuk menyekat EAC daripada berurusan berkenaan dengan syer itu ialah suatu injunksi larangan, manakala injunksi yang dipohon supaya EAC melakukan kesemua tindakan yang diperlukan untuk menghantarserahkan milikan kosong tanah tersebut merupakan suatu injunksi mandatori.

(2) Untuk menentukan sama ada injunksi interlokutori larangan untuk menyekat EAC daripada berurusan berkenaan dengan syer tersebut akan dibenarkan atau tidak, rukun di dalam *American Cyanamid Co v Ethicon* [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 adalah terpakai. Adalah perlu untuk MBf menunjukkan bahawa terdapat suatu soalan serius yang harus dibicarakan, bahawa ganti rugi tidak akan menjadi pampasan yang mencukupi jika ia berjaya di perbicaraan, bahawa imbangan kemudahan memihak kepadanya, dan bahawa terdapat keadaan istimewa yang memihak kepadanya. Dalam kes ini, relief yang dipohon untuk membekukan pengendalian syer MBf yang bernilai lebih daripada RM115 juta adalah amat tidak seimbang dengan amaun ganti rugi yang boleh dituntut untuk sebarang kelengahan dalam mengusir pekerja itu, dan adalah sungguh tidak berpatutan sekiranya mahkamah membenarkannya.

(3) Rukun *American Cyanamid* yang biasa adalah tidak terpakai di dalam suatu permohonan untuk injunksi mandatori. Suatu injuksi mandatori interlokutori tidak akan dibenarkan kecuali jika kes itu adalah jelas dan harus diputuskan dengan segera. Suatu darjah keyakinan yang tinggi bahawa pada perbicaraan, akan kelihatan bahawa injunksi tersebut telah diberikan dengan betul diperlukan.

(4) Dalam kes ini, suatu injunksi mandatori untuk memaksa EAC untuk mengambil kesemua langkah yang diperlukan untuk menghantarserah milikan kosong adalah jelas tidak sesuai. Tidak ada keadaan istimewa yang wujud dan terdapat pertikaian yang serius mengenai sama ada EAC telah menghantarserah milikan kosong atau tidak menurut terma perjanjian. Juga, adalah tidak mungkin untuk menetapkan suatu tempoh dalam mana EAC harus mendapat semula premis itu. Ganti rugi merupakan remedi yang memadai di dalam keadaan kes ini, dan adalah jelas bahawa EAC mampu membayar ganti rugi jika keputusan perbicaraan tidak memihak kepadanya.]

Notes

For cases on interlocutory injunctions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1562–1649.

Cases referred to

American Cyanamid Co v Ethicon [1975] AC 396; [1975] 1 All ER 504; [1975] 2 WLR 316 (folld)

Jakeman v South West Thames Regional Health Authority [1990] IRLR 62 (folld)

Keet Gerald Francis Noel John v Mohd Nor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Locabail International Finance Ltd v Agroexport [1986] 1 All ER 901; [1986] 1 WLR 657 (folld)

Shephard Homes Ltd v Sandham [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348 (folld)

Temporal v Temporal [1990] 2 FLR 80 (folld)

Loh Siew Cheang (*P Jayasingam* and *Loo Foong Meng* with him) (*Cheang & Ariff*) for the plaintiff.

Tommy Thomas (*S Selvaratnam* with him) (*Skrine & Co*) for the defendant.

Cur Adv Vult

KC Vohrah J: The plaintiff ('MBf') has sued the defendant ('EAC') for specific performance of a sale and purchase agreement ('the S & P') entered into between themselves, in that vacant possession of the sale land ('the estate land') be delivered by EAC to MBf. There is a claim for damages for breach of the S & P and costs. EAC in its defence alleges that vacant possession of the estate land was delivered to MBf on 8 March 1995 within the meaning of the S & P, and counterclaims for several declarations relating to 72,424,058 ordinary shares in MBf (which formed the consideration for the sale of the estate land), general damages for breach of contract, special damages, interests and costs.

MBf in this summons-in-chambers has filed for injunctive reliefs, one to restrain EAC from dealing with the shares and the other to order EAC to do all acts necessary to deliver vacant possession of the estate land MBf purchased, Padang Meiha Estate, in Kedah under an S & P dated 9 March 1994 from EAC. The purchase price was RM115,878,492. This consideration, however, was to be satisfied in kind through the issue of the requisite number of MBf shares at 50 sen each at an issue price approved by the Securities Commission.

It was an unusual agreement, as no deposit was payable to EAC upon execution of the S & P.

The shares (72,424,058 of new ordinary shares have been issued, listed and quoted in the Kuala Lumpur Stock Exchange); were listed on 8 March 1995, and that date pursuant to the S & P is the completion date of the S & P. The estate land has, on the other hand, been transferred to a nominee and subsidiary of MBf, Glocard Sdn Bhd.

There is, however, a fundamental problem relating to the estate land which has so far defied three resolutions. The Padang Meiha Estate

A comprises 5082.4 acres, and at the moment 200 persons, according to Encik Tommy Thomas for EAC, who formerly worked in the said estate are occupying quarters in about 50 acres of land in the said estate.

On 9 March 1995, Glocard Sdn Bhd acting on behalf of MBf issued a circular letter to 460 employees of EAC in the said estate offering them B employment on terms and conditions no less favourable than those enjoyed by them until such offer. 441 did not accept the offer, and 200 of these 441 persons are the persons who are occupying the quarters in the estate.

MBf contends that EAC did not, as agreed in the S & P, deliver vacant possession of the estate land on the completion date and wants these workers removed; it prays for an interlocutory injunction requiring C EAC 'to forthwith do all acts necessary to deliver forthwith to the plaintiff vacant possession' of the estate land.

The other injunction prayed for is a negative interlocutory injunction directed at EAC prohibiting it from dealing with the shares that had been issued to EAC — in these terms, 'selling, disposing of, transferring, parting D with, assigning and/or otherwise dealing with the shares issued and allotted by the plaintiff to the defendant ... until vacant possession is granted'.

Some reminders on some simple principles relating to injunctions are useful.

First, an injunction is an order of the court forbidding the initiation E or the continuance of some act or state of affairs or commanding that an act be done (see Kerr, *Injunctions;* Spry, *Equitable Remedies*; Sharpe, *Injunctions and Specific Performance* — quoted in LA Sheridan, *Injunctions In General* (1994 Ed) Barry Rose, Law Publisher Ltd, at p 1).

An injunction which forbids doing or going on doing an act, for F example, trespass on the plaintiff's land by parking cars there, is *prohibitory*. An order which directs the defendant to do something to repair an omission, or to restore the prior position by undoing a wrongful act such as building in breach of a restrictive covenant, is a *mandatory* injunction (see LA Sheridan, *Injunctions In General*, at p 1).

G For our purposes, the injunction sought by MBf against EAC to do all acts to deliver vacant possession of the estate is a mandatory injunction.

Normally, since the case of *American Cyanamid Co v Ethicon* [1975] AC 396 at pp 407–408; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 323, the practice of the courts is to subject an application for an interlocutory injunction to some tests to determine whether an interlocutory H injunction will be granted, and these require an applicant to show that:

(1) there is a serious question to be tried;

(2) if the applicant were to succeed at the trial, damages would not be adequate compensation for his loss;

I (3) the balance of convenience (or lately, the balance of justice) lies in his favour; and

(4) there are special circumstances in his favour or no special circumstances in favour of the respondent.

Additionally, the granting of an interlocutory injunction is subject to the usual equitable considerations. A

These principles have been subject to various interpretations or clarification by English and Malaysian cases, including the recent case of *Keet Gerald Francis Noel John v Mohd Nor bin Abdullah & Ors* [1995] 1 MLJ 193. B

The ordinary *American Cyanamid* principles are not applicable in an application for a mandatory injunction. In the case of a mandatory interlocutory injunction, for its grant there must be a high degree of assurance that at the trial it will appear that the injunction was rightly granted (*Shephard Homes Ltd v Sandham* [1971] Ch 340; [1970] 3 All ER 402; [1970] 3 WLR 348; *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901; [1986] 1 WLR 657). This is far more than is required for a prohibitory injunction to which the *American Cyanamid* principles apply. As put by LA Sheridan (at p 35): C

> That may be no more than a way of saying that the balance of convenience is more often against a mandatory injunction than it is against a prohibitory injunction at the interlocutory stage because an interlocutory mandatory injunction is more likely to involve the defendant in expenditure, more likely to be the final determination of the dispute and more difficult to compensate if the defendant wins at the trial. D

In *Jakeman v South West Thames Regional Health Authority* [1990] IRLR 62, Auld J said that in the absence of special circumstances, an interlocutory mandatory injunction would not be granted unless the case was clear and one which should be decided at once. E

To turn back to MBf's application for the mandatory injunction to compel EAC to take all necessary steps to deliver vacant possession, let me say that there is serious dispute as to whether EAC has not delivered vacant possession in accordance with the terms of the S & P. EAC contends that vacant possession in the context of various clauses in the S & P was deemed to have been delivered on the completion date, after which EAC with the consent and knowledge of MBf proceeded to manage the estate for MBf, notwithstanding that MBf, although obliged to execute a management agreement with it, refused to execute it. EAC points to a considerable amount of correspondence and other documents to show that EAC by conduct managed the estate and that vacant possession was deemed delivered. EAC also points out that an audit check was carried out by MBf on 7 March 1995, to facilitate handing over of possession on 8 March 1995, and that vacant possession was completed on 8 March 1995. F G H

Then again, MBf contends that the former workers of the estate who are now in 50 acres of the estate land should be removed by EAC, as they are EAC's employees. This is disputed by EAC who say the workers are no longer EAC's employees, but are trespassers on the estate land of the registered owner, and it is for the registered owner to evict these trespassers. Whether they are EAC's employees is not only a matter of interpretation of the relevant employment law, but also a matter of evidence whether I

A EAC had repudiated its contract with its employees. If they are not EAC's employees, then who evicts them from the land which no longer belongs to EAC? These too are serious issues to be tried.

Clearly, therefore, to my mind, there are serious disputes as to facts which need to be resolved at trial, and the case is not a strong and unusual B case for me to grant the mandatory injunction sought for. Again, no special circumstances have been made out for me to grant the mandatory injunction sought for. It has also to be borne in mind that to grant the injunction would mean giving the whole relief it has claimed in the action, and that is discouraged.

C As is pointed out by LA Sheridan (at p 15) in regard to a mandatory injunction, in addition to specifying what the defendant must do, the order should stipulate when or by when he must do it. There is no power to commit a person to prison for contempt of court for disobedience of an injunction requiring him to do an act, unless he refuses or neglects to do it at or within the time fixed by the judgment or order or by any subsequent D order (see *Temporal v Temporal* [1990] 2 FLR 80). In the instant case, what the mandatory order seeks in reality is for EAC to take eviction proceedings in one of the subordinate courts in Kedah. It will be well nigh impossible to fix a timetable within which EAC must commence proceedings against the former workers, go for trial and recover the premises, bearing in mind that eviction proceedings are by no means tidy and that appeals E against the court's decision may take place. A mandatory injunction is clearly not suitable.

Finally, in my view, damages (see discussion later) would be an adequate remedy in the circumstances of this case and clearly, EAC would be able to afford to pay damages if the trial result is not in its favour.

F I now come to the prayer for the prohibitory injunction to restrain EAC from dealing with the shares.

Here, I would need to go back to the principles set out in the *American Cyanamid* case. As pointed out, the applicant is required to show that there is a serious question to be tried. The next step to consider is the G inadequacy of damages, and this is what is said in the case as regards that ([1975] AC 396 at p 408; [1975] 1 All ER 504 at p 510; [1975] 2 WLR 316 at p 323):

> ... the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a H permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally I be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff ... the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial ... he would be adequately compensated under the plaintiff's undertaking as to damages ...

> If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

In so far as the instant case is concerned, the shares at the time of issue were worth millions of ringgit, RM115,878,492.

What the prayer seeks to do is to prevent the defendant from dealing with these shares over a problem relating to vacant possession of the estate land, which is no more EAC's property but that of MBf's subsidiary, Glocard. Assuming development work cannot take place, as claimed, on the 5082.4 acres of land less 50 acres occupied by the trespassers (but taking into account that MBf must take steps to mitigate losses), would damages resulting from the delay in evicting the trespassers amount to RM115,878,492? Even assuming that it is decided after trial that EAC should give vacant possession of the estate land, and that would mean EAC would have to take eviction proceedings whereupon MBf would be entitled to damages for breach of contract less the costs to be incurred by EAC for the eviction proceedings, the damages that would be awarded would not amount to more than a pinprick in terms of a percentage of the total value of the shares issued to EAC. The relief sought to freeze dealings in shares worth more than RM115m is inordinately disproportionate to the amount of damages that can be claimed, and it will be highly unconscionable for the court to grant it.

In all the circumstances of the case, I dismiss the application for the injunctive reliefs with costs.

Application dismissed.

Reported by Isabel Liong